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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 333

ANTHONY PINO, PETITIONER

v.

H. R. LANDON, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals (R. 128–143) is reported at 215 F. 2d 237. The opinion of the District Court (R. 104–114) is reported at 119 F. Supp. 122.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1954 (R. 143). The petition for a writ of certiorari was filed on September 9, 1954, and was granted November 8, 1954 (R. 144). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a case placed "on file" under Massachusetts practice—after a verdict of guilty, a suspended sentence to imprisonment, and a probationary period—involves a "conviction" within the meaning of Section 241 (a) (4) of the Immigration and Nationality Act of 1952.

2. Whether a conviction for petit larceny based on the theft of twelve golf balls constitutes a conviction for a crime involving moral turpitude under Section 241 (a) (4) of the Immigration and Nationality Act of 1952.

3. Whether the fact that petitioner's convictions occurred prior to the effective date of the Immigration and Nationality Act excludes them from the scope of Section 241 (a) (4) of that Act.

4. Whether the deportation order was vitiated by procedural errors.

STATUTE INVOLVED

Specifically applicable are Sections 241 (a) (4) and (d) of the Immigration and Nationality Act of 1952 (66 Stat. 204, 208; 8 U. S. C. 1251 (a) (4) (d), which in pertinent part provide:

> (a) Any alien in the United States (including an alien crewman) shall, upon order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) * * * at any time after entry is convicted of two crimes involving moral

turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

* * * * *

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

Additional portions of the Immigration and Nationality Act of 1952 are set forth in the Appendix, *infra*, pp. 52–60.

STATEMENT

On December 18, 1953, the petitioner was taken into custody by the District Director of the Immigration and Naturalization Service of the Department of Justice, pursuant to an order of deportation issued on a finding that he had twice been convicted of crimes involving moral turpitude (R. 3). Contending that this order was invalid, the petitioner, on the same day, December 18, 1953, filed a petition for a writ of habeas corpus (R. 1, 2–12). The District

Court issued the writ, held a hearing, and on February 1, 1954, entered an order discharging the writ and dismissing the petition (R. 104). The order was affirmed by the Court of Appeals on August 2, 1954 (R. 143).

The evidence against the petitioner, as found by the Special Inquiry Officer (R. 64–74) and the Board of Immigration Appeals (R. 76–95), is as follows:

Petitioner, an alien, was born in Italy in 1907. He was admitted to the United States in 1908 for permanent residence and has maintained residence in the United States since that time.

In December, 1948, in a district court of the Commonwealth of Massachusetts, petitioner was charged with having stolen twelve golf balls. He entered a not guilty plea but was found guilty and sentenced to one year in the House of Correction. Appeal was taken on December 27, 1948, but withdrawn on December 28 by leave of court, and a motion for new trial was filed and allowed. On retrial on January 4, 1949, a judgment of guilty was entered and sentence of one year in the House of Correction was imposed. An appeal was filed on January 10, 1949, but withdrawn January 28 by leave of court and the sentence was suspended and petitioner was placed on probation. On January 30, 1950, the sentence was

revoked and the case placed "on file." (See Exhibit 5, R. 57–58, 18–19.)[1]

It was also shown that earlier, in January, 1928, petitioner had been indicted by a grand jury in Suffolk County, Massachusetts, for abuse of a female child. He entered a plea of not guilty and was sentenced to be committed in a Massachusetts Reformatory for a period of five years and one day (Exhibit 6, R. 59–60, 19). The warrant of arrest in the deportation proceeding had charged a prior conviction for rape, but at the hearing it developed that the conviction was for abuse of a female child. A new charge was lodged during the hearing to conform to the actual facts as proved (R. 20) and the Inquiry Officer granted an adjournment to give petitioner additional time to respond.

During the deportation hearing, the Special Inquiry Officer asked petitioner how many times he had been arrested (R. 17). He also offered, as exhibits in the proceeding, over petitioner's objection, a photostatic report of the Massachusetts Board of Probation (R. 17–18, 43) and a report from the Identification Division of the Federal Bureau of Investigation (R. 18, 45–55), showing a long history of arrests.

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[1] As certified, the notation "appeal waived" appeared to be as of January 30, 1950. It was stipulated, however, that appeal was waived on January 28, 1949 (R. 102–103).

SUMMARY OF ARGUMENT

I

Section 241 (a) (4) of the Immigration and Nationality Act of 1952 calls for the deportation of an alien who, after entry, "is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial." Although petitioner was found guilty of petit larceny, was sentenced to one year of imprisonment and placed on probation for that year, and was actually under probation for the year, he argues that he was not "convicted" as that term is used in Section 241 (a) (4), and that the entry, after the end of the year's probation, of the phrase "Sentence revoked. On file" imports under state law a lack of finality which prevents the judgment from being a "conviction". It is the position of the government that the courts below were correct in concluding that the incidents of the "on file" entry under state law do not prevent it from being a conviction within the scope of the federal statute.

The general meaning to be assigned to the word "convicted" as used in a federal statute dealing with a subject over which Congress has plenary power must be resolved by reference to federal law. Cf. *United States* v. *Security Trust & Savings Bank, Executor,* 340 U. S. 47, 49; *Howard* v.

Commissioners, 344 U. S. 624. To the extent that the conviction takes place in a state court, the federal administrative agencies and the federal courts must necessarily look to what transpired in the state courts to determine whether what there occurred is in fact a "conviction" as that term is used in the federal Act. But it is the result, and not the labeling by the state, that determines whether a particular judgment is or is not a "conviction" for the purpose of the deporation laws.

The federal statute which provides for deportation of a person convicted of two crimes "regardless of whether confined therefor" makes it clear that the imposition of a term of imprisonment is not necessary to render a judgment a "conviction". In spite of petitioner's argument to the contrary, this language must have been designed to do more than overcome the effect of *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, where it had been held under the prior statute that "sentenced more than once" meant sentenced at two separate times. That specific problem is covered by the language of the statute providing for deportation on conviction of two crimes "regardless of whether the convictions were in a single trial". The separate phrase "regardless of whether confined therefor" was obviously designed to change the requirement of the former statute that there had to be, for two crimes, sentences to imprisonment for a year or

more. The same purpose also appears in Section 242 (h) which provides that deportation may be effected even though an alien is on probation. Normally, in federal law, a judgment suspending sentence or suspending execution of sentence is regarded as a "conviction". *Korematsu* v. *United States,* 319 U. S. 432.

While the statute does not make explicit the degree of finality which a judgment must have in order to be deemed a "conviction," it must be assumed that a judgment is not a "conviction" while it is subject to direct attack by the ordinary processes of appellate review. On the other hand, the term "convicted" cannot mean that a judgment is so final that there is no possibility that it may ever be vacated by some form of collateral attack. The correct interpretation of the word "convicted" in the statute is that adopted by the court below, that a person is deemed "convicted" after a judicial determination of guilt and a judgment which are no longer subject to the normal processes of appellate review.

The court below has found that the proceedings in the state court do meet this standard in that under Massachusetts law there was a judicial determination of guilt no longer subject to ordinary review. This should be conclusive under the rule, which this Court has reiterated many times, that it will "ordinarily accept the determination of local law of the Court of Appeals" of a partic-

ular circuit. *Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U. S. 530, 534.

However, on a *de novo* examination of the question this Court should reach the same conclusion. What has happened to petitioner on the petit larceny charge meets the tests of a conviction as that term is used in the federal statute; he has been subjected to a final adjudication of guilt and the regular processes of appellate review are no longer open to him. Petitioner was placed on probation as the result of a finding of guilt after trial. He himself admits that the normal method for review of that adjudication is not now available to him. Under Massachusetts law, the time to appeal from the adjudication of guilt is at the time of sentence or not at all. *Mariano* v. *Judge of District Court,* 243 Mass. 90. The entry "Sentence revoked on file" after the year's probation, did not have the effect of wiping out the adjudication of guilt; it was "a mere suspending of active proceedings in the case." *Commonwealth* v. *Dowdican's Bail,* 115 Mass. 133, 136. Petitioner himself so recognized when, in January 1953, he made a motion for a new trial which was denied.

The situation where proceedings are suspended before any sentence has been imposed is different from that where the suspension occurs after a defendant has already been subjected to discipline. In the latter situation, as a practical matter, the "on file" entry is merely a method of stating that

the probationary period has been satisfactory and supervision may be terminated without further sentence, but without eradicating what has gone before. Since, therefore, the "on file" entry does not take away the force of what has gone before, it does not weaken the effect of the imposition of discipline on an adjudication of guilt as a "conviction" for the purposes of the federal statute.

Under the *Mariano* case, *supra,* it is doubtful whether petitioner would have a right of appeal in the unlikely event that the sentencing court should in the future remove the case from its "on file" status and impose sentence again. Even if there should be such a right, however, it cannot be said to be the normal process of appellate review. Although different in character, it would be more akin to a right of collateral attack on a judgment. Such a right, which is not in the normal process of review, even if it exists, will not defeat the final character of the adjudication for the purpose of deportation.

II

The conviction of petit larceny is a conviction of a crime involving moral turpitude. Petit larceny can and normally does carry the imputation of moral turpitude. The moral wrong in taking property of another does not differ with the success of the theft or the proficiency or industry of the thief. Courts which have had occasion to consider the problem have so held, not only in the context of the deportation statute, but in other con-

texts in which the term "moral turpitude" has historically been used, such as disbarment, revocation of licenses, slander, and impeachment of witnesses. This consistent interpretation over the years shows that larceny, even though designated petit, generally violates commonly accepted standards of morality. It is thus a crime involving moral turpitude as that term, with its "deep roots in the law" (see *Jordan* v. *De George*, 341 U. S. 223, 227), is used in the statute.

The court below was of the view that, even though it is conceivable that a particular act of stealing might not violate the normal, common standards of morality, the administrative officers have no authority to go behind the conviction and find that, under the particular facts of a case, a petit larceny conviction is not for a crime involving moral turpitude. This holding is supported by the weight of authority in the lower courts, but we do not deem it necessary to urge nor for this Court now to decide that question. It is sufficient for the purposes of this case that petitioner has not shown that his crime is an exception to the general rule that petit larceny normally involves moral turpitude. It must be conceded that the one issue which the immigration authorities and reviewing courts may not reconsider is the issue of guilt or innocence and there have been suggested no extenuating circumstances which would take this case out of

the general rule that stealing is a crime involving moral turpitude. The relevance of the bare fact that the stolen items consisted of twelve golf balls can only be that the crime was petit larceny. But, as is pointed out above, the fact that larceny is petit rather than grand is not of itself an extenuating circumstance.

III

Petitioner argues that, as a matter of statutory construction, the provisions of Section 241 (a) (4) making deportable an alien "who at any time after entry is convicted of two crimes involving moral turpitude * * * regardless of whether confined therefor" should be read to apply only to convictions occurring after the effective date of the Act. The answer to this contention is that Section 241 (d) explicitly declares that, unless otherwise specifically provided, the provisions of all of Section 241 (a) shall apply "notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act." There is no specific language in Section 241 (a) (4), such as the precise word "hereafter" which occurs in subsections (3) and (11), to take it out of the retrospective reach of Section 241 (d) and the use of

the present tense is merely an example of standard statutory language.

The legislative history shows that Congress intended to facilitate deportation of alien criminals by the new Act. To read Section 241 (a) (4) as having only prospective application would be contrary to that Congressional purpose. In view of the fact that Congress, since 1917, has provided for the deportation of aliens convicted and sentenced to two crimes, it is evident that Congress did not, in 1952, intend to have Section 241 (a) (4) apply only to persons convicted of two crimes after 1952. Petitioner's argument that such persons would still be deportable under the prior Act by virtue of the savings clause of the 1952 Act, even if sound, does not apply to the situation where an alien has been convicted of one crime before 1952 and then is convicted of a second crime after 1952. Under petitioner's construction of the 1952 Act, such an alien would not appear to be deportable. Reading Section 241 (a) (4) and Section 241 (d) together, the construction which most clearly accords with the Congressional purpose is that Section 241 (a) applies to any two crimes committed by the alien at any time after his entry into the United States.

IV

Petitioner argues that the hearing was improper and that the hearing officer failed to act in a judicial capacity because he permitted the

introduction of records showing petitioner's long history of arrests. However, the presence of some irrelevant evidence in the record does not contaminate the entire proceeding. *Bilokumsky* v. *Tod*, 263 U. S. 149. The essential facts on which petitioner's deportability must be determined are matters of official record admitted by petitioner to relate to him. The issues as to whether the crimes for which he had been convicted involve moral turpitude arise here on undisputed facts and depend upon application of legal principles which are subject to review by the courts. Hence the admission of evidence of arrests could not have affected the essential issues resolved at the hearing.

ARGUMENT

Section 241 (a) (4) of the Immigration and Nationality Act of 1952 provides for the deportation of any alien "who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial." Petitioner who has been adjudged guilty and sentenced for two crimes—abuse of a female child and petit larceny—concentrates his attack in this Court on the petit larceny conviction as a basis for deportation, arguing that it is neither a "conviction" nor a crime involving moral turpitude. He also con-

tends that the 1952 Act must be given a prospective construction making it inapplicable to convictions occurring before its enactment. And, finally, he attacks the validity of the administrative hearing on procedural grounds. We discuss each of these contentions.

I

PETITIONER WAS "CONVICTED" OF PETIT LARCENY AS "CONVICTED" IS USED IN SECTION 241 (A) (4) OF THE IMMIGRATION AND NATIONALITY ACT

As noted above, Section 241 (a) (4) provides for the deportation of a person convicted of two crimes involving moral turpitude "regardless of whether confined therefor." Although he was found guilty, was sentenced to one year imprisonment and placed on probation for that year, and actually served the probationary period, petitioner contends that he was not "convicted." He argues that the later entry (on January 30, 1950) "Sentence revoked On file" imports under state law a disposition of the case which prevents the judgment from being a "conviction." Both the District Court and the Court of Appeals of the circuit, whose decisions as to what the state law is, are, in the absence of clear error, entitled to be given conclusive weight by this Court, have determined that the incidents of the "on file" entry under state law do not prevent the disposition of petitioner's case from being a conviction as that term is used in the federal statute. It is the posi-

tion of the government that such a conclusion is not only reasonable, but correct, and hence that the judgements of the courts below on this issue should be affirmed.

A. THE GENERAL MEANING OF THE TERM "CONVICTED" IN THE NATIONALITY ACT MUST BE DETERMINED BY FEDERAL LAW

As the court below pointed out (R. 137), the general meaning to be assigned to the word "convicted", as used in this federal statute dealing with a subject over which Congress has very broad power,[2] must be resolved by reference to federal law. Cf. *United States* v. *Security Trust and Savings Bank,* 340 U. S. 47; *Howard* v. *Commissioners,* 344 U. S. 624; *United States* v. *Gilbert Associates,* 345 U. S. 361; *United States* v. *Acri,* No. 33 decided January 10, 1955. See also *Jerome* v. *United States,* 318 U. S. 101, 104.[3] To the extent that the conviction is had in a state court, the federal administrative agencies and the federal courts must necessarily look to what transpired in the state courts to determine whether what there occurred is in fact a "conviction" as that term is used in the federal statute. But it is

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[2] United States Constitution, Art. I, Sec. 8, cl. 4; *Chirac* v. *Chirac,* 2 Wheat. 259, 269; *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 587–588; *Galvan* v. *Press,* 347 U. S. 522, 530–1.

[3] The question presented was whether the state law, which made it a felony to utter forged promissory notes, or the federal law which did not make such an act a felony, should control the definition of "felony" as it was used in the Federal Bank Robbery Act (48 Stat. 783; 50 Stat. 749, 12 U. S. C. 588b). The court looked to the federal law.

the facts, and not the labeling by the state, that determine whether a particular judgment or disposition is or is not a "conviction" for the purpose of the deportation laws. If a state, by some quirk of local terminology, called a civil judgment a conviction, no one would argue that such a court order, because called a conviction, would automatically be a conviction within the meaning of the federal statute.

As the Massachusetts cases themselves illustrate, the words "conviction" and "convicted" have been variously defined for different purposes by the courts of a single state,[4] and

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[4] As the court below pointed out (R. 135–137), various meanings have been given to the term "conviction" in Massachusetts, depending on the purpose of the statute in which it is used. See *Commonwealth* v. *Gorham*, 99 Mass. 420, 422. Conviction has been held to mean a finding of guilty, without entry of judgment or imposition of sentence, in construing a constitutional provision which prohibited the executive from granting pardons "before conviction" (*Commonwealth* v. *Lockwood*, 109 Mass. 323, 325, 336–338); and in a statute authorizing the presiding judge of a superior court to report to the supreme judicial court doubtful questions of law relating to a person convicted in the superior court. *Commonwealth* v. *Baldi*, 250 Mass. 528, 536–537. A case "on file" was held to be a conviction in a statute providing for revocation of a pharmacist's license after "conviction by a court of competent jurisdiction" (*Munkley* v. *Hoyt*, 179 Mass. 108, 111). Conviction has been deemed to require judgment and sentence, as used in statutes permitting impeachment of a witness by showing his conviction for crime, *Commonwealth* v. *Gorham*, 99 Mass. 420, 422; *Fay* v. *Harlan*, 128 Mass. 244, 245; *Attorney General* v. *Pelletier*, 240 Mass. 264, 311; *Karasek* v. *Bockus*, 293 Mass. 371; *Boston* v. *Santosuosso*, 307 Mass. 302, 330–331; but see *Forcier* v. *Hopkins*, 329 Mass. 668, 669–671; and a statute providing that the conviction of

have different meanings from state to state. Thus, "conviction" has sometimes been defined to mean a simple finding of guilt by a judge or jury [5] and at other times to mean a sentence imposed after judgment of guilty has been entered on a finding.[6] In some states, a suspension of sentence or suspension of imposition of sentence prevents the proceeding from being construed as a conviction [7] while in other states it has no such effect.[8]

Accordingly, to make the application of Section 241 (a) (4) dependent upon the vagaries of state definitions of "conviction" would thoroughly destroy its uniformity and multiply administrative problems. In providing for deportation of aliens "convicted" of two crimes involving moral turpitude, Congress had a definite federal purpose primarily in view and was not merely aiding or supplementing state legislation. The cases cited by petitioner, as to what is considered a con-

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a licensee for violating any of the provisions of the laws relating to intoxicating liquors "shall of itself make the license of said person void," *Commonwealth* v. *Kiley*, 150 Mass. 325, 326.

[5] *Quintard* v. *Knoedler*, 53 Conn. 485; *State ex rel. Butler* v. *Moise*, 48 La. Ann. 109; *State* v. *Alexander*, 76 N. C. 231.

[6] *Daughtrey* v. *State*, 46 Fla. 109; *State* v. *Smith*, 129 Iowa 709; *Smith* v. *Vernon County*, 188 Mo. 501; *Commonwealth* v. *McDermott*, 224 Pa. 363.

[7] *People* v. *Fabian*, 192 N. Y. 443; *People ex rel. Marcley* v. *Lawes*, 254 N. Y. 249; *State Medical Board* v. *Rodgers*, 190 Ark. 266; *Baker* v. *Modern Woodmen of America*, 140 Mo. App. 619.

[8] *Hill* v. *State*, 92 Tex. Cr. 312, 314; *Wilmoth* v. *Hensel*, 151 Pa. 200.

viction by Massachusetts, are immaterial even if they did (as they do not) give specificity to that term under state law without regard to the context in which the word is used.* The problem here is first to ascertain in what sense the federal statute uses the term "conviction" and then to determine whether petitioner has been convicted in that sense.

B. AS USED IN THE NATIONALITY ACT, "CONVICTED" MEANS AN ADJUDICATION OF GUILT AND A FORMAL JUDGMENT WHICH ARE NO LONGER SUBJECT TO THE NORMAL PROCESSES OF APPELLATE REVIEW

It is clear from the Nationality Act, which provides for deportation of a person convicted of two crimes "regardless of whether confined therefor," that the imposition of a term of imprisonment is not necessary to render a judgment a "conviction." Prior to adoption of the Immigration and Nationality Act of 1952, its precursor, the Act of 1917, 8 U. S. C. (1946 ed.), Section 155 (a), had provided (Appendix, *infra*, p. 60):

> * * * any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of

* See footnote 4, *supra*, p. 17.

> conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * shall, upon warrant of the Attorney General, be taken into custody and deported * * *.

Under this language it was essential to prove, in addition to convictions for more than one crime involving moral turpitude, that the alien had been sentenced to imprisonment for a term of one year or more on each conviction.[10] The omission from the present Section 241 (a) (4) of a requirement of imprisonment reveals that it was the purpose of Congress to dispense with this element. That is also apparent from H. Rept. No. 1365, 82d Cong., 2d Session, accompanying H. R. 5678 which became the Immigration and Nationality Act of 1952, which lists as deportable aliens "who, within 5 years of entry, are convicted of a crime involving moral turpitude and sentenced to confinement for a year or more; or who, at any time after entry, are convicted of two such crimes, *whether or not confined.*" [Emphasis added.] The report goes on to state, at p. 60:

> * * * Thus, an alien who at any time after entry is convicted of two crimes involving moral turpitude is deportable, regardless of whether confined therefor, whereas under existing law the alien must

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[10] *United States ex rel. Griffo* v. *McCandless*, 28 F. 2d 287 (E. D. Pa); *United States ex rel. Mignozzi* v. *Day*, 51 F. 2d 1019, 1020 (C. A. 2).

> have been sentenced more than once to a term of a year or more because of such convictions.

Petitioner argues (Pet. Br. 25) that this change was inserted merely to overcome the effect of *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, where it had been held, under the old language, that sentenced "more than once" meant sentenced at two separate times. But that problem is covered by the language of the statute providing for deportation on conviction of two crimes "regardless of whether the convictions were in a single trial." The separate phrase "regardless of whether confined" must have been meant to eliminate the necessity for imprisonment. Furthermore, Section 242 (h) provides that:

> An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, *probation*, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation. [Emphasis added.]

Thus, the Act shows on its face that a person is deemed "convicted" under Section 241 (a) (4) when he is placed on probation, whether the trial court imposes a sentence of imprisonment or not.[11]

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[11] Under the Federal Probation Act a federal court may place a person convicted of a crime on probation and suspend the imposition of sentence. *Roberts* v. *United States*, 320 U. S. 264.

This is the normal sense in which "conviction" is used in federal law. See *Berman* v. *United States*, 302 U. S. 211, holding that a defendant was convicted though the trial court, after imposing sentence, had suspended its execution and placed the defendant on probation; *Korematsu* v. *United States*, 319 U. S. 432, holding that a judgment suspending imposition of sentence and placing the defendant on probation was final and appealable.[12] The test applied to determine if a defendant stands convicted is whether or not a final judgment has been entered by the court pursuant to a finding of guilt established by verdict or by plea.

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[12] By way of explaining the "judgment is sentence" phrase used in the *Berman* case, the Court, in the *Korematsu* opinion, states (pp. 434–435):

"In the *Berman* case, *supra*, we held that the appeal was proper where the sentence was imposed and suspended, and the defendant was placed on probation. The probationary surveillance is the same whether or not sentence is imposed. In either case, the probation order follows a finding of guilt or a plea of nolo contendere. Thereafter, the defendant must abide by the orders of the court. He must obey the terms and conditions imposed upon him, or subject himself to a possible revocation or modification of his probation; and under some circumstances he may, during the probationary period, be required to pay a fine, or make reparation to aggrieved parties, or provide for the support of persons for whom he is legally responsible * * *. He is under the 'supervision' of the probation officer whose duty it is to make reports to the court concerning his activities * * * and at 'any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue

What the statute does not make explicit is the degree of finality which a judgment must have in order to be deemed a conviction. The court below assumed that a judgment, albeit a conviction in normal use of that term so long as it stands unreversed, would not be considered a conviction for the purpose of the deportation statute while it was subject to attack on appeal. It is reasonable that the word "convicted" as used in the statute be given an interpretation which "will ensure that this legal determination has been made with reasonable certainty and finality" (R. 137).

On the other hand, as the court below also pointed out (R. 138), the term "convicted" cannot mean that a judgment must be so final that there is no possibility that it may ever be vacated. On that basis, very few judgments of conviction would fall within the statute since the federal courts, and some state courts, recognize a limited right to attack a judgment of conviction even after a sentence has been fully served. See *United States* v. *Morgan*, 346 U. S. 502. By providing in Section 242 (h), Appendix, *infra*, p. 58 (*supra*, p. 21), that deportation may be effected even though a defendant has been released on probation or

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a warrant for his arrest.' * * * These and other incidents of probation emphasize that a probation order is 'an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline.' *Cooper* v. *United States*, 91 F. 2d 195, 199."

parole, the Act shows that "convicted" is not used in the sense of being completely immune from any form of collateral attack since, even where the rule of the *Morgan* case is not applicable, collateral attack cannot be defeated on the ground of mootness while a person is serving a probationary period. The only reasonable interpretation of the statute is the one adopted by the court below, that person is deemed "convicted" under the Act when there has been a judgment on a finding of guilt which is no longer subject to reversal by the normal processes of appellate scrutiny.

C. THE COURTS BELOW, WHOSE SPECIAL COMPETENCE IN MATTERS OF STATE LAW THIS COURT RECOGNIZES, HAVE PROPERLY FOUND THAT PETITIONER WAS "CONVICTED"

The one question of state law in this case is what was the effect under the Massachusetts penal provisions of the procedures followed in the case of the petit larceny charge, *i. e.*, was there a finding of guilt and a final judgment? The courts below first determined that there were such effects and on that basis correctly found that they constituted a "conviction" for the purposes of the Immigration and Nationality Act. That may be the end of the matter under the rule, which this Court has reiterated many times, that it will "ordinarily accept the determination of local law by the Court of Appeals" (*Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, 534), such courts being deemed "skilled in the law of particular states" in their circuit. *Propper* v. *Clark*, 337

U. S. 472, 486. See also *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707–708; *Steele* v. *General Mills, Inc.*, 329 U. S. 433, 439; *Hillsborough* v. *Cromwell*, 326 U. S. 620, 630; *Huddleston* v. *Dwyer*, 322 U. S. 232, 237; *Palmer* v. *Hoffman*, 318 U. S. 109, 118; *Helvering* v. *Stuart*, 317 U. S. 154, 163; *MacGregor* v. *State Mutual Co.*, 315 U. S. 280, 281.

However, even if the question is considered *de novo*, we urge the Court to reach the same conclusion. The essence of what has happened to petitioner on the petit larceny charge meets the tests of a "conviction"—he has been subjected to discipline on an adjudication of guilt and the normal processes of appellate review are no longer open to him. It is clear that there has been an adjudication of guilt after trial, and that the alien has been subject to penal discipline. He was actually on probation for a year. It is also clear, as petitioner himself admits (Pet. Br. 12), that the ordinary procedure for review of that adjudication is not now open to him. Under Massachusetts law, the time to appeal from the adjudication of guilt was at the time sentence was imposed, or not at all. In *Mariano* v. *Judge of District Court*, 243 Mass. 90, the defendant, after a finding that he was guilty of maintaining a liquor nuisance, was sentenced to six months' confinement. The sentence was suspended during his good behavior and he was placed on probation for one year. At time of sentence he was notified of his right to appeal but did not avail himself

of it. When, during the period of the suspension, defendant was charged and found guilty of two other crimes, his probation was revoked, a new sentence to confinement was imposed, and he was ordered committed. Defendant then sought to appeal from the new sentence. The court rejected his appeal, holding (p. 92) that "appeal must be taken forthwith from all convictions where the sentence is suspended." It said (p. 93):

> It follows that the conviction of the petitioner occurred on the third of January, 1922. That was a final judgment, from which he could appeal. If he desired to appeal, then and then only was the time to exercise that right.

See also *Renado* v. *Lummus,* 205 Mass. 155; *Finer* v. *Commonweath,* 250 Mass. 493, 497, to the effect that, when a defendant waives appeal to accept a mitigation of the sentence, his guilt is conclusively adjudged.

Petitioner argues, however, that because, after the year's probation, the court made the entry "Sentence revoked On file" there was no longer a sentence which could be said to be a "conviction" under the Immigration and Nationality Act. But it is plain under Massachusetts law, as the court below noted (R. 134), that the placing of a case on file does not wipe out the adjudication of guilt; it is "a mere suspending of active proceedings in the case," *Commonwealth* v. *Dowdican's Bail,* 115 Mass. 133, 136. See also *Commonwealth*

v. *Carver*, 224 Mass. 42.[12] Petitioner himself so recognized when, in January 1953, he made a motion for a new trial, which was denied (R. 139, 4, 13).

The situation where proceedings are suspended before any sentence has been imposed is obviously quite different from that presented where the suspension occurs after a defendant has already been subjected to sentence. It appears from the very report of the Judicial Council of Massachusetts, Public Document No. 144, which petitioner reprints as an appendix to his brief (Pet. Br. 51–53), that in the latter situation, as a practical matter, the "on file" entry is merely a method of stating that the probationary period has been satisfactory and supervision will be terminated without further sentence but also without eradicating what has gone before. The revocation of the sentence was necessary here since the imprisonment was merely suspended for the duration of the probationary period and at its termination the sentence would have taken effect unless the court took some further action to dispense with the imprisonment. Since, therefore, the "on file" entry after probation does not

[12] This case differs from the California situation involved in *In re Ringnalda*, 48 F. Supp. 975 (S. D. Cal.), which petitioner cites (Pet. Br. 21), in that here there is a trial court record available as evidence, while in the California case the trial court, pursuant to statute, had not only revoked the sentence but also expunged the record.

take away the force of what has gone before, and since the prior occurrence—imposition of probation on a final adjudication of guilt—is clearly sufficient to constitute a conviction for the purposes of the federal statute, the court below was correct in holding that the disposition of the petit larceny charge against petitioner amounted to a conviction for the purposes of deportation.

Under these circumstances, it is immaterial whether or not petitioner would have a right of appeal in the unlikely event that the sentencing court should remove the case from its "on file" status and impose sentence. It is clear that petitioner has at present no immediate right of review such as the regular right of appeal from a sentence imposed immediately after the adjudication of guilt. Although the *Dowdican's Bail* case (115 Mass. 133) contains language which indicates that a defendant may petition for final disposition of a filed case, the Massachusetts court, in its later decision in *Commonwealth* v. *Carver*, 224 Mass. 42, declares that a case remains on file "unless and until the prosecuting attorney shall move for sentence." Since petitioner has chosen not to attempt to change the status of the case, he is not in a position to complain if the federal government considers the case in the status in which it now is.

Moreover, even if the court should remove the larceny case from file and sentence petitioner anew, it is doubtful whether he would have the right of appeal. In the *Mariano* case, the court held that a defendant's right of appeal accrued at the time of sentence and that he could not appeal when a new sentence was imposed during the period of probation. By a parity of reasoning, there should be no appeal if sentence is imposed after a case has been on file. Thus, the judgment appears to be, not only practically, but also technically, final as to the accused. But even if there is a right of appeal after a new sentence, that cannot be said to be the normal process of appellate review. Although different in character, it would at best be more akin to a right of collateral attack on a judgment and therefore not such a right as will defeat the final character of the adjudication for the purposes of deportation. There is at most merely a faint possibility that the conviction may be set aside, not an immediate right of review.

The actual incidents of the disposition of the petit larceny charge against petitioner clearly establish that there has been the imposition of discipline after a formal adjudication of guilt, and that the normal processes of appellate review are no longer available. Thus, the judgment is a "conviction" within the terms of Section 241 (a).

II.

PETIONER'S CONVICTION OF PETIT LARCENY WAS FOR A CRIME INVOLVING MORAL TURPITUDE

Although petitioner did not raise the point in his petition for a writ of habeas corpus in the District Court and did not urge it before the Court of Appeals (see R. 140), he did raise in the petition for certiorari, and now argues, the question whether a conviction for petit larceny involving the theft of twelve golf balls is a crime involving moral turpitude within the purview of Section 241 (a) of the Immigration and Nationality Act. The question has two aspects—(1) whether petit larceny *per se* normally carries the imputation of moral turpitude, and (2) whether the circumstances of the crime may be considered in determining the question of turpitude. It is the government's position that petit larceny normally and usually imports moral turpitude and that, whatever may be the rule where special circumstances are shown which indicate that in a particular case such a conviction does not involve a violation of common standards of morality, this has not been shown to be such a case.

A. PETIT LARCENY NORMALLY IMPORTS MORAL TURPITUDE

Petit larceny can and normally does carry the imputation of moral turpitude. The moral wrong in taking property of another does not depend upon the skill of the thief, or his good or bad for-

tune in making a lucky haul or a poor one. As the Court said in *Tillinghast* v. *Edmead,* 31 F. 2d 81, 83 (C. A. 1), a case involving a conviction of theft of $15 under the same section of Massachusetts law (General Laws, c. 266, Sec. 30) under which petitioner was convicted:

> * * * it appears that theft or larceny was a crime at common law involving an act intrinsically and morally wrong and malum in se, and does not acquire additional turpitude from being declared unlawful by the municipal law. In other words, that an act was at common law intrinsically and morally wrong, malum in se, does not become any more or any less so by reason of the fact that the Legislature may see fit to call it a felony, if the thing stolen is of a value exceeding a given amount, or to call it a misdemeanor, if the thing stolen is of less value. In either case the offense is one involving moral turpitude.

All the courts which have had occasion to consider the problem in the context of the deportation statute have so indicated. *Bartos* v. *United States District Court,* 19 F. 2d 722, 724–726 (C. A. 8); *Tillinghast* v. *Edmead,* 31 F. 2d 81, 83 (C. A. 1); *Ex parte Wilson,* 35 F. 2d 537, 538 (S. D. Cal); *Wilson* v. *Carr,* 41 F. 2d 704, 706 (C. A. 9); *United States ex rel. Ventura* v. *Shaughnessy,* C. A. 2, No. 23206, decided January 31, 1955; *United States ex rel. Amato* v. *Commissioner,* 18 F. Supp. 480, 481 (S. D. N. Y.); *United States ex rel. Fracassi* v. *Kar-*

nuth, 19 F. Supp. 581, 583 (W. D. N. Y.); *United States ex rel. Parenti* v. *Martineau,* 50 F. 2d 902, 903 (D. Conn.); *United States ex rel. Patricola* v. *Karnuth,* 9 F. Supp. 961, 963 (W. D. N. Y.); *United States ex rel. Rizzio* v. *Kenney,* 50 F. 2d 418, 419 (D. Conn.); *United States ex rel. Ulrich* v. *Kellogg,* 30 F. 2d 984, 986 (C. A. D. C.); *United States* v. *Muller,* 87 F. Supp. 285 (S. D. N. Y.).[14]

Nor is such a holding confined to deportation cases. As this Court pointed out in *Jordan* v. *De George,* 341 U. S. 223, 227, in which it considered the meaning of "moral turpitude" as used in the deportation statutes:

> The term "moral turpitude" has deep roots in the law. The presence of moral turpitude has been used as a test in a variety of situations, including legislation governing the disbarment of attorneys and the revocation of medical licenses. Moral turpitude also has found judicial employment as a criterion in disqualifying and impeaching witnesses, in determining the measure of contribution between joint tort-feasors, and in deciding whether certain language is slanderous.

In the many applications noted by the Court petit larcency and equivalent misdemeanor offenses have been held to be crimes involving

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[14] In *United States ex rel. Rizzio* v. *Kenney,* 50 F. 2d 418, 419 (D. Conn.), in which the question was not directly in issue, there is a suggestion that "in unusual circumstances" theft might not involve moral turpitude.

moral turpitude,[18] on much the same reasoning as that of the court in the *Tillinghast* case, *supra*. See for example, *In re Henry*, 15 Idaho 755, 757–758, where a conviction of petit larceny was held to be a ground for disbarment, the court stating:

> * * * While it is true that the expression "moral turpitude" is not very accurately and concisely defined, and that the point at which an act begins to take on the color of turpitude is not very definitely marked and pointed out, still there can be no doubt in the mind of a man of ordinary intelligence but that he has long since passed into the confines of "moral turpitude" before he completes an act of larceny.

This consistent interpretation over the years in many contexts shows that larceny, even though designated petit, violates commonly accepted standards of morality. It is thus a crime involving moral turpitude in the sense that that term, with its "deep roots in the law", is used in the

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[18] Disbarment: *In re Henry*, 15 Idaho 755, 757; *In re Rothrock*, 25 Cal. 2d 588, 591. Revocation of license: *Bancroft* v. *Board of Governors*, 202 Okl. 108, 110. Slander: *Jones* v. *Brinkley*, 174 N. C. 23, 25. Impeachment of witness: *Bell* v. *Commonwealth*, 167 Va. 526, 531, 538; *Muse* v. *State*, 29 Ala. App. 271, 273; *Myles* v. *St. Louis Public Service Co.*, 52 S. W. 2d (Mo.) 595, 598; *Pendergraft* v. *State*, 107 Tex. Cr. 326, 328; *State* v. *Guyer*, 91 Vt. 290, 293; *Sweat* v. *State*, 132 Tex. Cr. 122, 123; *contra*, on the ground that petit larceny was no longer an "infamous crime," *Mulroy* v. *Prudential Insurance Co.*, 299 Ill. App. 598, 601–603.

statute.[18] Congress must have intended this phrase to reflect the "generally accepted moral conventions current at the time, so far as we [the court] could ascertain them." *United States v. Francioso,* 164 F. 2d 163 (C. A. 2). See also *United States ex rel. Iorio* v. *Day,* 34 F. 2d 920, 921 (C. A. 2); *Repouille* v. *United States,* 165 F. 2d 152, 153 (C. A. 2); *Sipp* v. *Coleman,* 179 Fed. 997, 998–999 (D. N. J.).

In *Jordan* v. *DeGeorge,* 341 U. S. 223, 229, in determining whether convictions of possessing whiskey and alcohol "with intent to sell it in fraud of law and evade the tax thereon" involved moral turpitude, this Court stated:

> In view of these decisions, it can be concluded that fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude.

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[18] The definition of moral turpitude most often quoted appears to be Bouvier's *Dictionary,* Rawle's Rev., 1151, which states:

"Everything done contrary to justice, honesty, modesty, or good morals, is said to be done with turpitude."

A more comprehensive definition may be found in Black's *Law Dictionary* (3d ed.) at pp. 1765–1766:

"A term of frequent occurrence in statutes, especially those providing that a witness' conviction of a crime involving moral turpitude may be shown as tending to impeach his credibility. In general, it means neither more nor less than 'turpitude'; i. e., anything done contrary to justice, honesty, modesty, or good morals. * * *"

By the same token, an *animus furandi* would characterize crimes of stealing as involving moral turpitude.[17] The American courts have consistently regarded stealing, no matter what the amount, as within the class of crimes involving moral turpitude.

B. THERE IS NO OCCASION IN THIS CASE TO CONSIDER WHETHER THERE CAN EVER BE SPECIAL CIRCUMSTANCES SURROUNDING THE COMMISSION OF THE CRIME WHICH WOULD TAKE A CONVICTION OF PETIT LARCENY OUT OF THE GENERAL RULE SINCE PETITIONER'S CONVICTION HAS NOT BEEN SHOWN TO BE SUCH A CASE

It is conceivable that there may be circumstances where a particular act of stealing would not in context violate the normal, common standards of morality. Such a possibility obviously motivated the dissent of Judge Anderson in *Tillinghast* v. *Edmead, supra,* 31 F. 2d at p. 84, when he said, in the portion of his opinion quoted by the court below (R. 140):

> * * * It seems to me monstrous to hold that a mother stealing a bottle of milk for her hungry child, or a foolish college student stealing a sign or a turkey, should

[17] As the cases discussed in the text show, the fact that the offense is a misdemeanor rather than a felony does not affect its quality as involving moral turpitude. This conclusion is supported by the background of the statute. Reference to moral turpitude initially appeared in the Act of March 3, 1891, 26 Stat. 1084, in the provision directing the exclusion of "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." Thus, from the start, moral turpitude was considered to embrace misdemeanors.

be tainted as guilty of a crime of moral turpitude.

The court below was of the view that no such circumstances could ever be considered; that (R. 140)

> If the crime in its general nature is one which in common usage would be classified as a crime involving moral turpitude neither the administrative officials in a deportation proceeding nor the courts on review of administrative action are under the oppressive burden of taking and considering evidence of the circumstances of a particular offense so as to determine whether there were extenuating factors which might relieve the offender of the stigma of moral obliquity.

The court pointed out that Congress did not overlook the possibility of extenuating circumstances in a particular case since it provided that deportation should not result if the sentencing judge recommended against deportation and that deportation does not result if an unconditional pardon has been granted for the crime.

This holding of the court below is supported by the great weight of authority in the relatively few lower court cases where this question has been raised with respect to petit larceny (see *supra*, pp. 31–32). And the general rule in deportation has been that the nature of the crime is conclusively established by the record. *Tillinghast* v. *Edmead, supra; United States ex rel. Giglio* v. *Neelly*, 208

F. 2d 337, 340 (C. A. 7); *United States ex rel. Zaffarano* v. *Corsi*, 63 F. 2d 757, 758 (C. A. 2). That was the approach taken by this Court in *Jordan* v. *De George*, 341 U. S. 223, when it looked merely to the elements of the crime charged in determining whether the crime was one involving moral turpitude. It is not the function of immigration officials to retry a criminal case, often long after the event. Obviously, no immigration officer or court on review could retry the issue of guilt or innocence, which had been determined by a court under all the constitutional safeguards which inure to a criminal trial. Matters going to mitigation of the crime—such as purpose, motive, and knowledge—would normally be so intertwined with the issue of criminal intent that an attempt to determine whether there were mitigating circumstances would most often, if not almost always, involve a redetermination of guilt. Moreover, as the court said in *United States* v. *Uhl*, 203 Fed. 152, 153 (S. D. N. Y.), affirmed, 210 Fed. 860 (C. A. 2):

> In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules. Consequently, in classifying offenses I think that they must designate as crimes involving moral turpitude those which in their inherent nature include it. Their function is not, as it seems to me, to go behind judg-

ments of conviction and determine with respect to the acts disclosed by the testimony the questions of purpose, motive and knowledge which are often determinative of the moral character of acts. Besides, the testimony is seldom available and to consider it in one case and not in another is to depart from uniformity of treatment. In my opinion when it has been shown that an immigrant has been convicted of a crime, the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude, according to its nature and not according to the particular facts and circumstances accompanying a commission of it. I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other. It is true that if they do not take such course some aliens who have been convicted of high crimes may be excluded although their particular acts evidence no immorality and that some who have been convicted of slight offenses may be admitted although the facts surrounding their commission may be such as to indicate moral obliquity. But such results always follow the use of fixed standards and such standards are, in my opinion,

necessary for the efficient administration of the immigration laws.[18]

It is not necessary to urge, nor for this Court now to decide, that never, in any conceivable circumstances, could the immigration authorities, in determining whether a crime involves moral turpitude, look beyond the record of conviction as that is normally defined—the charge or indictment, the plea, the verdict, and the sentence. See 37 Op. Atty. Gen. 293 (1933); 39 Op. Atty. Gen. 95 (1937). It might appear appropriate, and consistent with the legislative policy embodied in the moral turpitude provision, to hold that petit larceny could in some circumstances be regarded as not necessarily involving moral turpitude. But it

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[18] In a very recent case decided by the Second Circuit but not yet officially reported, *United States, ex rel Ventura* v. *Shaughnessy*, decided January 31, 1955 (*supra*, p. 31), the issue was whether the government had established that the alien had been convicted in Portugal of a crime involving moral turpitude prior to his entry into this country. In the last paragraph of the decision, the court states that it has not considered statements, which it apparently thought to be against his interest, contained in an affidavit by the alien on the ground the affidavit was not before the inquiry officer. In that statement the alien admitted being convicted and sentenced for the crime of theft in that he purchased two sacks of corn meal knowing them to have been stolen. The same affidavit states that the alien stole to feed his family. The court does not expressly indicate whether that factor would have carried any weight with it if it had considered the affidavit as part of the record, but the inference is that the alien's assertions, even if taken as true, would not have changed the result.

is sufficient for present purposes that this is not such a case.

Once it is conceded, as it must be, that the one issue which the immigration authorities and the reviewing courts may not take into consideration is the issue of guilt or innocence, then the only possibly extenuating circumstance revealed by the present record is that the object of the theft was an inexpensive item of sports equipment. It is submitted that this fact is not enough, by and of itself, to remove the crime of larceny, which in most circumstances undoubtedly involves moral turpitude, from the category of offenses which brand the offender as morally undesirable. The elements which render larceny morally culpable can well exist even though the gain is as small or insignificant as the goods stolen in this case. If the circumstances of this particular theft were nevertheless such as to negative moral turpitude and if the courts may consider such factors, then the burden was certainly on the petitioner to come forward with proof of these circumstances. The immigration authorities cannot have the burden of probing the background of each conviction. But it is a signal fact that petitioner has never attempted to bring before the immigration authorities or the courts any evidence, or even any assertion, that such special circumstances do exist. In fact, before the petition for certiorari in this Court, the petitioner never even raised the issue

of whether the crime was one involving moral turpitude.[19]

On the present record, the only real significance of the fact that the items stolen were twelve golf balls is that the crime was petit larceny, which, under Massachusetts Law (G. L. Chap. 266, Sec. 30), is the theft of property of a value of less than one hundred dollars.[20] Once it is established, as the cases cited *supra,* pp. 31–32 settle, that petit larceny does as a general matter involve moral turpitude, then it would be petitioner's burden to come forward with any special circumstances which remove his offense from the general category. That he has not done or tried to do.[21] Accordingly, his case is governed by the general rule.

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[19] It is not without weight that the petitioner was 41 years old at the time of the theft so that this was not a youthful aberration. The record further indicates that petitioner had had prior, and subsequent, brushes with the law. The charge was contested and he was tried and found guilty, not once, but twice, so that if he had defenses it must be assumed he presented them.

[20] Actually, the Massachusetts law includes grand larceny and petit larceny in the very same section (and sentence) of its General Law, the only differentiation being that the severity of the sentence is reduced for thefts of less than one hundred dollars.

[21] Petitioner's brief in this Court (Br. 36) states unequivocally that the criminal act must be judged by the statute forbidding it and the court record. "These and only these must indicate its character."

III

SECTION 241 (A) (4) APPLIES TO CONVICTIONS WHICH OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE IMMIGRATION AND NATIONALITY ACT OF 1952

Petitioner argues (Pet. Br. 43–47) that, as a matter of statutory construction, the provisions of Section 241 (a) (4) making deportable an alien "who at any time after entry is convicted of two crimes involving moral turpitude,* * * regardless of whether confined therefor" should be read to apply only to convictions occurring after the effective date of the Act. The answer to this contention is that Section 241 (d) explicitly provides that, except as otherwise provided in the section, the whole of Section 241 (a) has application to events which preceded the Act. Section 241 (d) states:

> Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

No specific language is used in Section 241 (a) (4) which exempts it from the retrospective application Section 241 (d) provides it shall have. This is evident from a comparison of the language of subsection (4) with that of subsections (3) and (11), Appendix *infra*, pp. 52, 54, where the precise word "hereafter" is used to indicate that the latter subsections have only prospective operation. Petitioner retorts that Congress used the present, not the past, tense in the phrase "is convicted." But the use of the present tense in statutes is familiar draftsmanship not designed to include or exclude past or future acts; rather, it is intended to read as speaking as of all times to which by law it is applicable. The word "is" is wholly neutral and furnishes frail support for an attempt to take Section 241 (a) (4) out of the reach of Section 241 (d) as a provision "otherwise specifically provided."

There is additional support for this conclusion. Section 19 of the Act of February 5, 1917, 39 Stat. 874, 889, 8 U. S. C. (1946 ed.) 155 (a), the predecessor of present Section 241 (a) (4), had provided for the deportation of any alien "who is *hereafter* sentenced more than once" (see Appendix, *infra*, p. 60, emphasis added). The fact that in 1952 Congress dropped the word "hereafter" indicates its specific purpose to eliminate the concept that only subsequent events were to be considered and, therefore, to include antecedent con-

victions. And the legislative proceedings which led to adoption of Section 241 (a) (4) show that Congress intended to amend the law to facilitate deportation of alien criminals. In House Report No. 1365, 82nd Cong., 2nd Sess., on H. R. 5678, which became the Immigration and Nationality Act of 1952, the Committee on the Judiciary, under the caption "Basic Changes" wrote (p. 28):

> 5. Broadens the grounds for exclusion and deportation of criminal aliens mostly in accordance with recommendations made by the Senate Special Committee to Investigate Organized Crime in Interstate Commerce.[22]

The Committee on the Judiciary of the Senate, commenting on the deportation of alien criminals, wrote in S. Rept. No. 1515 (81st Cong., 2d Sess.), pp. 391–392:

> It is the opinion of the subcommittee that the deportation provisions with respect to aliens who have been convicted of a

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[22] In S. Rept. No. 307 (82d Cong., 1st Sess.) the Special Committee to Investigate Organized Crime in Interstate Commerce recommended, on p. 15, that:

"xiii. The immigration laws should be amended to facilitate deportation of criminal and other undesirable aliens. To this end, the committee recommends the adoption of the legislative proposal heretofore recommended by the Commissioner of Immigration and contained in section 241 of S. 716 (82d Cong.), now pending before the Senate Judiciary Committee." Section 241 (a) (4) of S. 716 was couched in substantially the same language as Section 241 (a) (4) of the Act and also deleted the word "hereafter" as it appeared in the 1917 statute.

crime involving moral turpitude should be retained in the law with some modification. The subcommittee holds that there is ample justification for subjecting to deportation at any time after entry, aliens who were convicted or who admit the commission of such a crime, prior to entry into this country.

As to such crimes committed subsequent to the time of the alien's entry, it is held that deportation should be required, in the case of a single conviction, only if the conviction occurred within 5 years after entry and resulted in confinement in a prison or corrective institution for a year or more. In the case of an alien convicted of two such crimes at any time after entry not arising out of a single scheme of criminal misconduct, the alien is deportable regardless of whether sentenced to confinement.

The avowed purpose at least to preserve the grounds for deportation of alien criminals previously convicted explains the deletion of the word "hereafter" so as to give the section retrospective as well as prospective application. To read Section 241 (a) (4) as having prospective application alone would be squarely contrary to that congressional aim. Since 1917, Congress has provided for the deportation of aliens convicted and sentenced for two crimes, and it is evident that Congress did not, in 1952, intend to have

Section 241 (a) (4) apply only to persons convicted of two crimes after 1952.

Petitioner argues, however, that there is no need to give Section 241 (a) (4) retrospective application since the provisions of Section 19 of the Act of February 5, 1917 (8 U. S. C. (1946 ed.) 155), Appendix, *infra*, p. 60, making an alien deportable when he has twice been convicted and sentenced for more than one year for crimes involving moral turpitude, are continued in force by virtue of the savings clause, Section 405 of the Act of June 27, 1952. That section provides:

> (a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed * * * to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

Even assuming that a person convicted and sentenced to imprisonment for two crimes before December 1952 would be deportable under the Act

of 1917, by virtue of the savings clause, even though no deportation proceedings were pending against him when the 1952 Act became effective, the savings clause would not, in a normal construction, cover the situation where an alien had been convicted of one crime before 1952, and then was convicted of a second crime after 1952. In such a situation, under petitioner's construction of the 1952 statute, the alien would not be deportable under the 1952 statute, and would also not be deportable under the 1917 Act, which except to the extent that the savings clause applies, was expressly repealed by the Act of 1952. Section 403 (a) (13) of the Act of 1952. Such a result would, of course, be contrary to the evident Congressional purpose.

Reading Section 241 (a) (4) and Section 241 (d) together, the construction which most clearly accords with the Congressional purpose is the one adopted by the court below, that Section 241 (a) applies to any two convictions after the entry of the alien into the United States even though, in the words of Section 241 (d), the alien "entered the United States prior to the date of enactment of this Act", and even though "the facts, by reason of which any such alien belongs to any of the classes enumerated" (in this case the two convictions) "occurred prior to the date of enactment".

IV

THERE WERE NO PROCEDURAL DEFECTS IN THE HEARING WHICH WOULD INVALIDATE THE ORDER OF DEPORTATION

Petitioner also contends (Pet. Br. 47–50) that there were procedural defects in his hearing which require that he be given a new hearing even if this Court should decide that, on the admitted relevant facts relating to his convictions, he is deportable as a matter of law. The court below was correct in finding no merit in petitioner's contentions.

He argues that the hearing officer did not act in a judicial capacity as required by Section 242 (b) of the statute because he permitted the introduction, as "cumulative evidence", of reports of petitioner's past arrests. He also says that the hearing officer showed he was not acting judicially when, in response to an objection as to a question about arrest, the hearing officer said (R. 17):

> A deportation hearing has the intent of determining whether or not the respondent is deportable on the charge contained in the warrant of arrest or under any charge contained within the provisions of the Immigration and Nationality Act.

These actions do not indicate that the Special Inquiry Officer was acting in other than a judicial capacity. He was exercising his statutory authority to "interrogate, examine and cross-ex-

amine the alien." In his colloquy with petitioner's counsel he did no more than give a terse and accurate description of the purpose of the hearings. Section 242 (b) of the Act of 1952, in outlining the duties of a special inquiry officer conducting proceedings to determine the deportability of an alien, provides:

> * * * No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions.

Petitioner neither alleges that the Special Inquiry Officer participated in the investigation of this case, nor charges that he performed any prosecutive functions other than as permitted by Section 242 (b). At no time did the hearing officer transgress the limits of his judicial role as prescribed by the statute.

Inclusion in the record of the deportation hearings of copies of records from the Massachusetts Board of Probation and the Federal Bureau of Investigation, admitted by petitioner to relate to him, did not harm or prejudice petitioner so as to vitiate the proceeding. The presence of some irrelevant evidence in the record does not contaminate the entire proceeding. *Bilokumsky* v. *Tod,* 263 U. S. 149; *Tisi* v. *Tod,* 264 U. S. 131. In a habeas corpus petition the court will examine

the record only to determine whether the proceeding was intrinsically fair, *Bridges* v. *Wixon*, 326 U. S. 135,[28] and whether there was reliable and probative evidence to support a finding that the alien was deportable. *Schoeps* v. *Carmichael*, 177 F. 2d 391 (C. A. 9), certiorari denied, 339 U. S. 914. The courts will not intervene to correct procedural irregularities which do not, and cannot, work prejudice to the alien. *Sumio Madokoro* v. *Del Guercio*, 160 F. 2d 164, 167 (C. A. 9), certiorari denied, 332 U. S. 764.

As noted above, the essential facts on which petitioner's deportability must be determined are matters of official record admitted by petitioner to relate to him. The Special Inquiry Officer repeatedly stated to petitioner that the evidence consisted of certified copies of records of his convictions in the Massachusetts courts (R. 19, 21, 124) and that the decision did not rest on the F. B. I. arrest record (R. 25). Since the list of petitioner's arrests neither added to nor detracted from the evidence adduced to support the order of deportation, it cannot be said that they worked to the prejudice of petitioner who had already

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[28] In *Bridges* v. *Wixon*, 326 U. S. 135, at 156, the Court, relying on *Vajtauer* v. *Commissioner*, 273 U. S. 103, 106, said:

"In these *habeas corpus* proceedings the alien does not prove he had an unfair hearing merely by * * * showing that incompetent evidence was admitted and considered."

admitted the essential facts upon which the order for his deportation was based. The issues as to whether the crimes for which petitioner had been convicted involved moral turpitude and were in fact convictions arise here on undisputed facts and depend upon application of legal principles which are subject to review by the courts. Hence, the admission of irrelevant evidence of petitioner's criminal record, or an attempt to discover whether there were grounds for petitioner's deportation other than those charged in the warrant of arrest, could not have affected the essential issues resolved at the hearing.

CONCLUSION

It is therefore respectfully submitted that the order of the court below should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

JOHN F. DAVIS,
Special Assistant to the Attorney General.

BEATRICE ROSENBERG,
RICHARD J. BLANCHARD,
Attorneys.

MARCH, 1955.

APPENDIX

1. The Immigration and Nationality Act of June 27, 1952, provides in pertinent part:

Section 241 (a) (8 U. S. C. 1251 (a), 66 Stat. 204):

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this Act or in violation of any other law of the United States;
>
> (3) hereafter, within five years after entry, becomes institutionalized at public expense because of mental disease, defect, or deficiency, unless the alien can show that such disease, defect, or deficiency did not exist prior to his admission to the United States;
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether con-

fined therefor and regardless of whether the convictions were in a single trial;

(5) has failed to comply with the provisions of section 265 unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, or has been convicted under section 266 (c) of this title, or under section 36 (c) of the Alien Registration Act, 1940, or has been convicted of violating or conspiracy to violate any provision of the Act entitled "An Act to require the registration of certain persons employed by agencies to disseminate propaganda in the United States, and for other purposes", approved June 8, 1938, as amended, or has been convicted under section 1546 of title 18 of the United States Code;

(6) is or at any time has been, after entry, a member of any of the following classes of aliens:

* * * * *

(7) is engaged, or at any time after entry has engaged, or at any time after entry has had a purpose to engage, in any of the activities described in paragraph (27) or (29) of section 212 (a), unless the Attorney General is satisfied, in the case of any alien within category (C) of paragraph (29) of such section, that such alien did not have knowledge or reason to believe at the time such alien became a member of, affiliated with, or participated in the activities of the organization (and did not thereafter and prior to the date upon which such organization was registered or required to be registered under section 7 of the Subversive Activities Control Act

of 1950 have such knowledge or reason to believe) that such organization was a Communist organization;

(8) in the opinion of the Attorney General, has within five years after entry become a public charge from causes not affirmatively shown to have arisen after entry;

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 248, or to comply with the conditions of any such status;

(10) entered the United States from foreign contiguous territory or adjacent islands, having arrived there on a vessel or aircraft of a nonsignatory transportation company under section 238 (a) and was without the required period of stay in such foreign contiguous territory or adjacent islands following such arrival (other than an alien who is a native-born citizen of any of the countries enumerated in section 101 (a) (27) (C) and an alien described in section 101 (a) (27) (B));

(11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importa-

tion or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate;

(12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 212 (a); or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution or any other immoral place;

(13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

(14) at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semiautomatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun;

(15) at any time within five years after entry, shall have been convicted of violating the provisions of title I of the Alien Registration Act, 1940;

(16) at any time after entry, shall have been convicted more than once of violating the provisions of title I of the Alien Registration Act, 1940; or

(17) the Attorney General finds to be an undesirable resident of the United States by reason of any of the following, to wit: has been or may hereafter be convicted of

any violation or conspiracy to violate any of the following Acts or parts of Acts or any amendment thereto, the judgment on such conviction having become final, namely: * * *.

(18) has been convicted under section 278 of this Act or under section 4 of the Immigration Act of February 5, 1917.

* * * * *

(d) Except as otherwise specifically provided in this section, the provisions of this section shall be applicable to all aliens belonging to any of the classes enumerated in subsection (a), notwithstanding (1) that any such alien entered the United States prior to the date of enactment of this Act, or (2) that the facts, by reason of which any such alien belongs to any of the classes enumerated in subsection (a), occurred prior to the date of enactment of this Act.

* * * * *

Section 242 (b) (8 U. S. C. 1252 (b), 66 Stat. 209):

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to

be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. * * *

Section 242 (h) (8 U. S. C. 1252 (h), 66 Stat. 212):

An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.

* * * * *

Section 403 (a) (13) (66 Stat. 279):

(a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:

* * * * *

(13) Act of February 5, 1917 (39 Stat. 874);

* * * * *

Section 405 (a) (66 Stat. 280).

Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, procedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act, makes application for admission, his admissibility shall be determined under the provisions of law in effect on the date of the issuance of such visa. An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, or for adjustment of status under section 4 of the Displaced Persons Act of 1948, as amended, which is pending on the date of enactment of this Act, shall be re-

garded as a proceeding within the meaning of this subsection.

2. Section 19 of the Immigration Act of 1917, 39 Stat. 889, provided:

> That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * shall, upon the warrant of the Attorney General, be taken into custody and deported: * * *.

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